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No. 458

In the Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In the United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3472-47

UNITED STATES OF AMERICA, PLAINTIFF

VS.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Supreme Court of the United States, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on July 29, 1949. A petition for appeal is presented to the district court herewith, to wit, on September 23, 1949.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U. S. 427;
United States v. *Yellow Cab Company*, 332 U. S. 218;
United States v. *Columbia Steel Co.*, 334 U. S. 495.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 3, 4), commonly known as the Sherman Act, provides in part as follows:

> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such Territory or Territories and any State or States or of the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. * * *
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> SEC. 4. The several district courts in the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

THE ISSUES AND THE RULING BELOW

This is an equity suit brought by the United States in the United States District Court for the District of Columbia against the Washington Real

Estate Board, an incorporated trade association of real estate brokers in Washington, D. C.; the members of this Board; the National Association of Real Estate Boards, a nationwide incorporated trade association of which both the Washington Real Estate Board and its members are members; and Herbert U. Nelson, executive vice-president of the National Association of Real Estate Boards. The complaint charges that the defendants combined and conspired to fix the commission rates to be charged by members of the Washington Board when acting as agents in the sale, exchange, lease and management of real property in the District of Columbia, in violation of Section 3 of the Sherman Act.

The major facts established at the trial of the cause, as they are set forth in the opinion of the district court and its findings of fact, may be summarized as follows:

Members of the Washington Board, some of whom are incorporated, perform a substantial portion of the total business done in the District of Columbia in real estate brokerage transactions. The Washington Board has for many years prescribed fixed rates of commission to be paid to real estate brokers on sales of real property. All applicants for membership in the Board are required to fill out and sign an application form which states that the applicant agrees to subscribe to the Constitution and By-Laws, Code of Ethics and other rules of the Board. Section 3 of the Code of Ethics provides: "Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates." The schedules of commission have been construed by the members

as non-mandatory in character and as setting forth a basis upon which to estimate fair compensation for services rendered. In actual practice the published rates of commission are used in the great majority of transactions although in many cases members of the Washington Board depart from the schedule.

The district court held that the agreement fixing the commission rates to be charged by real estate brokers for negotiating sales of real estate in the District of Columbia did not, on the facts established by the evidence, violate Section 3 of the Sherman Act. The court concluded that the rule that a price-fixing agreement imposes restraints which are *per se* unreasonable and illegal under the Act does not apply to an agreement fixing charges for "personal services". The court found support for this distinction between price fixing as to commodities and price fixing as to "personal services" in the first sentence of Section 6 of the Clayton Act, which reads: "The labor of a human being is not a commodity or article of commerce." The court said that a real estate board may be likened to a labor union of real estate brokers and that the principle is the same when those who receive commissions in compensation for their services combine to fix their commission charges and when those who toil for wages combine upon the minimum wage rates which they will accept.

The court said that there was no showing that the commission rates which were fixed were unreasonable in themselves or resulted in a substantial diminution of competition. The court therefore found it unnecessary to pass upon the question whether a

combination of this kind might, under some circumstances, come within the prohibitions of the Act.

The court, after filing findings of fact and conclusions of law, entered judgment for the defendants.

THE QUESTIONS ARE SUBSTANTIAL

The appeal presents the important question of whether a combination fixing rates of commission for real estate brokerage transactions comes within the prohibitions of the Sherman Act. The appeal presents the further important question of whether such a combination is subject to the rule that the restraints imposed by price-fixing combinations are *per se* unreasonable and unlawful under Sections 1 and 3 of the Act.

It is settled that exchange of services for pay, as well as dealings in commodities, constitute trade or commerce within the meaning of the Act. It was held at an early date that the Act applies to combinations which restrain competition in providing the service of transportation. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505. Decisions in recent years have upheld the application of the Act to combinations which restrain competition in providing cleaning and dyeing services (*Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 431) and medical and hospital services (*American Medical Association* v. *United States*, 317 U. S. 519). The restraints which the Act prohibits cover both those on the marketing of services and those on the marketing of goods. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, 495, 498. And where trade or commerce in the District of Columbia is concerned, the prohibitions of Section 3 extend to

any "occupation, employment, or business" carried on for purposes of gain (with the possible exceptions of the "liberal arts" or "learned professions"). *Atlantic Cleaners & Dyers* case, *supra*, at pp. 436-437.

Price-fixing agreements among those engaged in a service industry or trade are within the rule that price-fixing agreements are *per se* in unreasonable restraint of trade and unlawful.[1] There is sound basis for these decisions since the reasons for the *per se* rule apply with full force where the price for services is fixed by agreement. "The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221), whether the prices involved are those for goods or services. Congress has not left it to the courts to determine "whether or not particular price-fixing schemes are wise or unwise, healthy or destructive"; with respect to such agreements, it has established "one uniform rule applicable to all industries alike." *Id.*, pp. 221, 222.

The district court appears to have held that defendants' combination involved fixing prices for "personal services," and that such a combination is exempted from the prohibitions of the Sherman Act by what the court termed "the pertinent public policy in respect to personal services" to be found in Section 6 of the Clayton Act. But Section 6 relates

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[1] *Trans-Missouri Freight Assn.* and *Joint Traffic Assn.* cases, *supra*, as interpreted in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 398; *Atlantic Cleaners & Dyers* case, *supra*; *United States* v. *Maryland & Virginia Milk Producers Assn., Inc.* (C.A. D.C.), C.C.H. Tr. Reg. Rep. 48-51, par. 62,452, (petition for certiorari pending, No. 195, this Term.)

exclusively to "labor, agricultural, or horticultural organizations" and their members. Real estate brokers are not such an organization or members thereof. They are independent entrepreneurs, employers rather than employees. They occupy offices and engage in advertising. They commonly employ varying numbers of salesmen, secretaries and others. Their brokerage services involve no employer-employee relationship, but are rendered pursuant to a series of independent contracts, each with a new customer. Activities of this character lie wholly outside the scope of Sections 6 and 20 of the Clayton Act, as well as outside of related provisions of the Norris-LaGuardia Act. *Columbia River Packers Association, Inc.* v. *Hinton*, 315 U. S. 143, 145-147; *American Medical Association* case, *supra*, at pp. 535-536. See also *American Medical Association* v. *United States*, 130 F. (2d) 233, 243 (C.A. D.C.), affirmed, 317 U. S. 519.

We believe that the appeal presents questions of substance as to error by the district court in its interpretation of the Sherman Act and as to conflict between its decision and applicable decisions of this Court, and we believe that the questions are of public importance.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 23, 1949.

OPINION

THE COURT (HOLTZOFF, J.): This is a civil action by the United States for an injunction to restrain the defendants from continuing alleged violations of the Sherman Antitrust Act. The suit is brought under Section 3 of the Act, U. S. Code Title 15, Section 3. The pertinent portions of this section are as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the District of Columbia is declared illegal."

The defendants in this case are, first, the Washington Real Estate Board, which is a corporation having its place of business in the District of Columbia. Other defendants are members of the Board, who are sued as a class, a few of the members being named as representatives of the class. Finally, there is also joined as a defendant the National Association of Real Estate Boards, which is a corporation having its principal place of business in Chicago, Illinois. The National Association comprises among its members various local real estate boards, and the Washington Real Estate Board is one of such members.

The Government contends that the defendants have combined to fix real estate brokerage commissions to be charged by real estate brokers in the District of Columbia. The Government urges that this activity constitutes a violation of the Sherman Antitrust Act.

In brief, the evidence shows that the membership of the Washington Board embraces about 250 real estate brokers out of a total number of about 2,000 brokers operating in the District of Columbia. The Washington Board has for many years prescribed fixed rates of commissions to be paid to brokers on sales of real property. The rates are published and

are readily available to the public. All members of the Board are urged to use these rates. Actually, both members and many nonmembers employ them. There is nothing clandestine or surreptitious about this activity of the Washington Board.

In 1943 the rates were changed, resulting in higher charges in many instances and in lower commissions in other situations. In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board. For example, smaller commissions than the standard rate have been charged in connection with large developments comprising a great many homes.

The National Association has been joined as a defendant on the theory that it has encouraged and has incited the Washington Board to fix and prescribe rates of commissions to be charged by the members of the latter. No evidence has been introduced tending to show that the standard rate of commissioners prescribed by the Washington Board is unreasonable or excessive or that this activity unduly or unreasonably restrains competition as between brokers or adversely affects the sales of real property. On the contrary, there is evidence in the record to the effect that before the Board attempted to fix standard commission rates there was chaos and confusion, resulting in occasional overcharges on the part of the less scrupulous members of the craft, and that one of the purposes of the Board was to eliminate this undesirable condition. The Government contends, however, that irrespective of whether it is reasonable or laudable, the fixing of commission rates is illegal *per se* and constitutes a violation of the Sherman Act.

Ever since the decisions of the Supreme Court in *Standard Oil Company* vs. *United States*, 221 U. S. 1, and *United States* vs. *American Tobacco Company*, 221 U. S. 6, it has been consistently held

that the Sherman Act does not ban all restraints of trade but proscribes only those that are unreasonable. In the two cases to which I have referred, the Court held that the Sherman Act must be construed in the light of reason and that the rule of reason must prevail.

In recent years it has been held by the Supreme Court that price-fixing is *per se* an unreasonable restraint of trade and, therefore, illegal in and of itself, even under the so-called rule of reason. *United States* vs. *Socony-Vacuum Oil Company*, 310 U. S. 150, and *United States* vs. *Trenton Potteries Company*, 273 U. S. 392. The cases in which this doctrine had been formulated and enunciated, however, involved prices of commodities and of articles of trade. This principle has never been invoked, so far, at any rate, in connection with charges for personal service. There is a vast distinction in principle between fixing the prices of commodities or articles, on the one hand, and prescribing charges for personal services, on the other hand. A statement of the pertinent public policy in respect to personal services is to be found in the Clayton Act, U. S. Code, Title 15, Section 17. The statement is as follows:

> "The labor of a human being is not a commodity or article of commerce."

This is a very important, basic pronouncement. The term "labor" as used in the Clayton Act is not limited to the work of manual laborers or of mechanics. It comprises intellectual labor as well. Neither is the term restricted to the work of the poor or the needy. Thus there are labor unions of mechanics, of clerks, of teachers, and of airplane pilots. Many other similar instances might be adduced. All of those organizations fix wages or salaries to be charged by their members. Such activities have never been held to form violations of the Sherman Act *per se*.

A real estate board may in a sense be likened to a labor union of real estate brokers. Admittedly there is no case in the Federal courts that has applied to personal services the rule that the fixing of prices of commodities or articles is *per se* an unreasonable restraint of trade. To contract for one's personal services is a fundamental right of every man. For men to combine to regulate the compensation to be charged by them for their own services is also entirely legal. While this right has been generally recognized in respect to persons who toil for wages or salaries, no reason appears discernible why it is not equally applicable in principle to those persons who work for commissions. The instant case appears to be the first occasion in the history of the enforcement of the Sherman Act that the Government has challenged this right.

It is a matter of common knowledge that rates of commissions for brokers' services of various kinds have been openly prescribed by numerous organizations of brokers for a great many years. This activity has never been condemned as violative of the Sherman Act, and the Government has never so contended prior to this case. On the contrary, the result of stabilization of charges and the consequent uniformity has generally been considered as being in the public interest. No reason is perceived for changing these principles as they have been heretofore understood.

The Court is of the opinion that for persons engaged in a particular occupation to fix or prescribe a standard charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act. A different problem might be presented if the rates fixed were shown to be unreasonable or oppressive in themselves or if it appeared that they resulted in a substantial diminution of competition or otherwise created an unreasonable restraint of trade or com-

merce. There is no such showing or even contention in this case.

Judgment for the defendants.

Counsel will submit proposed findings of fact and conclusions of law.

I certify that the foregoing is the official transcript of the Opinion of the Court in United States vs. National Association of Real Estate Boards et al., Civil Action No. 3472-47, on Tuesday, June 28, 1949.

(S.) FRANCIS J. ATTIG,
Official Reporter.

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